BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	Docket No. UT-003040 **QWEST CORPORATION'S RESPONSE TO NOTICE OF OPPORTUNITY TO FILE COMMENTS**

INTRODUCTION

On November 7, 2001, in response to Bench Request No. 37, Qwest filed a redlined Qwest Performance Assurance Plan ("QPAP") for the state of Washington, together with a copy of its Comments on the Facilitator's Report explaining acceptance and/or clarification or slight modifications of the Facilitator's Recommendations.[1] Those documents represent Qwest's

[1] Qwest notes that, on page 15 of its Comments on the Facilitator's Report, there is a typographical error in the following sentence: "It would be reasonable that small data discrepancies, alone, should be

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response to a portion of this Notice of Opportunity to File Comments ("Notice") and are attached hereto for convenience. With respect to the specific questions raised by the Washington Utilities Commission relating to the QPAP, Qwest provides the following comments.

RESPONSES TO ALJ'S QUESTIONS

1. WAC 480-120-560 establishes standards and CLEC payments for collocation in Washington. The QPAP provides for different collocation standards and payments. How should the Commission address the differences in collocation standards and payments between the QPAP and Washington rules? What changes, if any, should be made to the QPAP to address the differences?

While Qwest believes that the performance measurements that form the basis of the QPAP are most appropriate and reflective of appropriate standards, Qwest recognizes that in Washington, as well as other states, there may be differences between existing wholesale service quality rules and the standards and remedies in the QPAP. Because the State rules and the QPAP standards are likely to cover the same underlying performance activity, Qwest should not be held accountable to CLECs for two potentially different standards and duplicative remedies in rules. Accordingly, the QPAP requires CLECs to choose between any such duplicative remedy schemes. Section 13.6 of the QPAP provides that it "contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole," so that a CLEC must choose in electing the benefits of the QPAP to "adopt the PAP in its entirety."

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the basis for an audit." As the context makes clear, that sentence should instead read: "It would be ***un***reasonable that small data discrepancies, alone, should be the basis for an audit."

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The Washington SGAT, however, presents a unique situation because it incorporates specific standards and remedies (based on the rules) into the SGAT at section 8.4.1.10. Obviously, to maintain two distinct and conflicting standards and remedies for collocation in the same contract would be inappropriate. Accordingly, Qwest proposes replacing the collocation delayed installation provision in section 6.3 of the QPAP with the terms in section 8.4.1.10 of the SGAT and eliminating the duplicative SGAT section. A copy of the proposed revision is provided as an attachment to these comments. Eliminating that section of the SGAT will not adversely affect any CLECs because any CLECs who do not wish to elect the QPAP will still have the benefit of the Washington rule.

2. The 36% cap in the QPAP is based upon 1999 ARMIS revenue. Should the Commission amend the QPAP to base the cap on more recent ARMIS data?

No. As the Facilitator noted, it is inherently speculative whether Qwest's net local revenue will increase or decrease in future years, and Qwest agrees with his analysis. As competition increases and market share drops, net revenues may decline.

A fixed cap adds a measure of certainty to the PAP and stability to the overall payment structure. Consequently, other plans approved by the FCC have contained such a cap.

3. Are the provisions of the QPAP, as amended by the Report, consistent with existing Washington SGAT and ICA provisions? If not, how should the QPAP be amended?

With the resolution explained above, Qwest is unaware of any inconsistencies. The QPAP will be incorporated as Exhibit K to the SGAT, and incorporates the force majeure and dispute resolution provisions thereof so that these provisions are not inconsistent.

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4. Page 42 of the Report recommends language regarding payment of Tier II funds "for any purpose allowed to it by state law." For what purposes should the Commission consider Tier II payments?

The language quoted above is part of the following paragraph:

> *Payment of Tier 2 Funds: Payments to a state fund shall be used for any purpose determined by the commission that is allowed to it by state law. If the Commission is not permitted by state law to receive or administer Tier 2 payments to the state, the payments shall be made to the general fund or to such other source as may be provided for under state law.*[2]

If the Commission is permitted by state law to receive and/or administer the Tier 2 payments, there are several purposes for which the Commission should consider Tier 2 payments. Qwest does not suggest that the following list is exhaustive of all the possibilities, only that the following items are ones the Commission may wish to consider. (1) The Commission could consider Tier II payments as a funding mechanism to offset or defray the costs that end users incur when a company provides service to unserved areas — either areas within an exchange boundary where there are no facilities, or areas outside a carrier's defined exchange boundary. (2) The Commission could consider Tier II payments for the purpose of ensuring that the Commission has adequate resources to administer the additional responsibilities placed on it by the Telecom Act. (3) Finally, the Commission could consider the payments as a source of funds to pay for the costs of deployment of facilities for advanced services, where those facilities might otherwise not be deployed. As the list suggests, use of the funds should be driven by concepts and principles and should not be earmarked for any specific groups or individuals, must be competitively neutral, and should be supported by sound policy objectives.

5. Does the QPAP require modification to address any of the terms and conditions contained in the Qwest merger settlement agreement?

[2] Facilitator's QPAP Report (Oct. 22, 2001) at 42.

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No. The QPAP and the merger settlement agreement ("MSA") are separate and exclusive remedies. Both are integrated documents addressing wholesale service and provide different regimes for measuring the service, including different intervals, different payment provisions, and different reporting obligations. As noted below,[3] it would be improper for a CLEC to have access to both sets of remedies.

Indeed, even the MSA recognizes that CLECs should not be entitled to duplicative recovery. The MSA (at 20, section VI.B) states:

> These remedies are not intended to duplicate any remedies available to a CLEC under an interconnection agreement between the CLEC and Company [Qwest]. A CLEC may, at its discretion, choose to receive remedies under this Agreement or its interconnection agreement for any Company [Qwest] failure to comply with provisioning intervals.

This election of remedies provision is consistent with the comparable provision in section 13.6 of the QPAP (implementing the Facilitator's recommendations) as described above in response to question 1. Accordingly, by opting into the QPAP, a CLEC waives remedies available under the MSA, and no changes to the QPAP are warranted.

Moreover, the MSA itself was intended to be only an "interim" measure,[4] and will sunset on December 31 of next year. The MSA also provides for an immediate sunset if the Commission adopts wholesale service quality rules. This sunset provision, thus, implicitly reinforces the basic principle that there should not be dueling sets of quality standards and remedies. This sound principle is recognized in both the MSA and the QPAP.

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[3] *See* "Allowing CLEC Recovery of Non-Contractual Damages in Other Proceedings," Qwest Corporation's Comments on the Facilitator's QPAP Final Report at 4-6.

[4] *See* MSA at 3, Section I.A.

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6. How should the pick and choose principles contained in the Commission's Interpretive and Policy Statement in Docket UT-990355 apply to provisions the QPAP?

The Commission's Interpretive and Policy Statement is a nonbinding statement of the Commission's current opinion regarding the scope of Section 252(i) of the Act and the FCC's implementation of this provision in its "pick and choose" rule.[5] Section 252(i) requires a LEC to make available to CLECs "any interconnection, service, or network element" provided under another agreement "upon the same terms and conditions." As the Supreme Court has recognizing in upholding this rule, the rule permits an ILEC to require a requesting carrier to accept all terms that it can demonstrate are "legitimately related" to the desired term.[6] Principle 10 of the Interpretive and Policy Statement recognizes this rule.

The provisions of the Commission's Interpretive and Policy Statement were explicitly considered in the SGAT workshops, and Qwest believes that the SGAT provisions that address pick and choose are fully consistent with the Statement. Those provisions are contained in Section 1.8 of the SGAT, which specifically references Docket UT-990355.

The threshold question of how the pick and choose rule applies to the QPAP is whether the QPAP, which is an undertaking by Qwest for purposes of section 271 relief from the FCC that has been incorporated into the SGAT for convenience in administration, involves an agreement to make any "interconnection, service, or network element" available. As the FCC noted in adopting the pick and choose rule, it is designed to make available not simply "entire agreements," but "provisions relating to specific elements."[7] The QPAP would not appear to fall

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[5] 47 C.F.R. § 51.809(a).

[6] *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 377 (1999) (citing First Report & Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd 15,499 ¶ 1315 (1996) ("*First Report & Order*").

[7] *First Report and Order* at ¶ 1310.

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within the scope of such provisions: It is a comprehensive plan for addressing performance standards that cut across Qwest's entire wholesale service operation. Indeed, the QPAP was negotiated through a series of comprehensive workshops in which all CLECs were invited to participate from the outset, not through an arrangement with one CLEC that others might later desire to renegotiate for themselves. But in any event, Qwest believes that the QPAP is fully consistent with the pick and choose rule and the Commission's Interpretive and Policy Statement.

First, the QPAP permits any CLEC to opt into the QPAP or not, at its election. Nor does a CLEC need to opt into other provisions of the SGAT in order to adopt the QPAP. However, the QPAP does specifically reference two SGAT sections that are incorporated by reference into the QPAP for convenience. Those sections must therefore become part of any interconnection agreement that contains the QPAP. Section 13.3 of the QPAP references the definition of a force majeure event as set forth in SGAT section 5.7. Thus, that definition becomes part of the QPAP, and the carrier who opts in to the QPAP also opts into SGAT Section 5.7 for purposes of interpreting the QPAP. The other SGAT provision that follows the QPAP is the dispute resolution provision in Section 5.18 of the SGAT. This provision is referenced in Sections 13.9, 16.1, and 18.0 of the QPAP, and applied to resolution of disputes that are specific to the QPAP. If the CLEC wishes to retain its existing dispute resolution provisions for non-QPAP related disputes, Qwest will agree to do so.

Second, every CLEC that adopts the QPAP must adopt it in its entirety. Thus, even if the QPAP were a "provision relating to specific elements," no CLEC will be receiving any QPAP terms that are not available "upon the same terms and conditions" available to any other. It thus complies with Principle 4. Moreover, the QPAP was designed as a comprehensive arrangement

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for the provision of all wholesale services. Each provision of the QPAP is interrelated to every other provision. Thus, the PIDs are related to the caps and the penalties, and the legal provisions of the QPAP relating to election of remedies, offset, force majeure, and dispute resolution are an integral part of the entire plan as it applies to the implementation of each of the PIDs. Principle 10 acknowledges that terms that are legitimately related may be combined in an offering, where "the interconnection, services or elements" are either "technically inseparable" or "related in a way that separation will cause an increase in underlying costs." This principle of "technical" inseparability again confirms that the pick and choose rule is designed to permit picking and choosing of terms and conditions relating to separate physical facilities, not terms and conditions within a legal remedies scheme. But in any event, as noted above, Qwest can prove that all of the terms and conditions in the QPAP are legitimately related to each other, and that separation would cause substantial increases in the underlying costs of administering the plan. To take merely one example, Qwest's total payment liability is capped at 36% of its net revenues. Without this cap, the underlying costs of the potential QPAP payments would be far greater. The same would be true of any of the other provisions that would be the likely subject of a pick and choose effort — such as the limits on escalation, the force majeure exception, and the election of remedies and offset provisions.

Dated this 21st day of November, 2001.

QWEST

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